

2015

# Segregation under the Guise of the fair Housing Act: Affirmatively Furthering Segregative (and Expensive) Housing Developments

Meredith Rieth

Follow this and additional works at: <http://scholarship.law.umn.edu/lawineq>

---

## Recommended Citation

Meredith Rieth, *Segregation under the Guise of the fair Housing Act: Affirmatively Furthering Segregative (and Expensive) Housing Developments*, 33 LAW & INEQ. 285 (2015).

Available at: <http://scholarship.law.umn.edu/lawineq/vol33/iss1/6>

# Segregation Under the Guise of the Fair Housing Act: Affirmatively Furthering Segregative (and Expensive) Housing Development

Meredith Rieth†

## I. Introduction

Segregation is alive and well in the United States.<sup>1</sup> And while overt discrimination still exists, even well-intentioned programs can serve antithetical purposes if left unmonitored—a segregative use of the Fair Housing Act illuminates this reality.<sup>2</sup> Facially neutral laws can be discriminatorily applied,<sup>3</sup> underpinned with discriminatory purposes,<sup>4</sup> or have a racially discriminatory effect.<sup>5</sup> Akin to a wolf in sheep's clothing, a discriminatory effect can mask itself in anti-discriminatory, integrative legislation.

On its face, the Fair Housing Act (“Act” or “FHA”), Title VIII of the Civil Rights Act of 1968, explicitly contains negative, anti-

---

†. J.D. Candidate, University of Minnesota Law School, 2015. First and foremost, many thanks to both Myron Orfield and the Institute on Metropolitan Opportunity for the guidance. Additional thanks to the editors and staff, both past and present, of *Law and Inequality: A Journal of Theory and Practice*. Any shortcomings and oversights are my own.

1. See *Cowan v. Cleveland Sch. Dist.*, 748 F.3d 233, 238 (5th Cir. 2014) (“A freedom of choice plan is not necessarily an unreasonable remedy for eliminating the vestiges of state-sponsored segregation, but it has historically proven to be an ineffective desegregation tool.”).

2. *Id.*

3. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

4. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

5. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (stating that mere racially discriminatory impact is not enough to show that the law is a race classification that gets strict scrutiny; rather, some showing of racially discriminatory purpose is also required to show that the law is a race classification—but disproportionate impact is not irrelevant to complainant's equal protection argument); see also *Vill. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 266 (1977) (holding that circumstantial evidence can be used to show discriminatory purpose; that proof that the law was motivated in part by a rationally discriminatory purpose would not automatically require the law's invalidation; and that in these circumstances, the burden shifts and defendant carries the burden of establishing that the same decision would have been made even if the impermissible purpose had not been considered).

discrimination obligations.<sup>6</sup> However, the FHA also contains positive obligations.<sup>7</sup> Therefore, the FHA not only prohibits discrimination, but participants must also take steps to overcome patterns of segregation through integrative measures.<sup>8</sup> Central to this Note is the latter, affirmative obligation.

The Fair Housing Act contains the positive obligation to create “integrated and balanced living patterns.”<sup>9</sup> To fulfill the obligation to build integrative developments, participants frequently use the Low-Income Housing Tax Credit program (“LIHTC”), a federal subsidy that incentivizes the private market to invest in low-income housing.<sup>10</sup> Furthermore, LIHTC participants must explain their LIHTC distributions by developing a Qualified Allocation Plan (“QAP”).<sup>11</sup> Based on how and where QAP awards points, participants can target which developers receive LIHTC funding to build housing projects with affordable rents.<sup>12</sup>

Despite the FHA’s integrative and affordable purposes, housing authorities can use the LIHTC program to site developments in a segregative manner—these units offer affordable rents to prospective tenants, but can cost more money development-wise than integrative placements.<sup>13</sup> This Note uses the Twin Cities Metropolitan Area as an example case, although unfortunately, the area is not an anomaly.<sup>14</sup> Minneapolis and St.

6. Fair Housing Act of 1968 § 804, 42 U.S.C. § 3604(a) (2012).

7. A negative obligation does not require the individual to do anything beyond not participating in the prohibited act—in other words, passively refrain from the named action. In contrast, a positive obligation requires affirmative, proactive steps by the individual or entity. *See, e.g.*, *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 457 (D. Md. 2005) (“It has been judicially recognized that Section 3608 prescribes an affirmative duty . . . ‘something more than simply refrain from discriminating (and from purposely aiding discrimination by others.)’”) (citing *NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987)).

8. *See* 42 U.S.C. § 3608(d) (2012).

9. *NAACP*, 817 F.2d at 156; *see* 114 CONG. REC. 2276–707 (1968); *see also* *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (referencing comments by FHA co-sponsor Senator Walter F. Mondale, who stated that the FHA “aimed to replace the ghettos by truly integrated and balanced living patterns”).

10. I.R.C. § 42 (2012); *see also* Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189.

11. *See, e.g.*, MINN. STAT. § 462A.222 subd. 3 (2013).

12. *Id.*

13. James A. Long, *The Low-Income Housing Tax Credit in New Jersey: New Opportunities to Deconcentrate Poverty Through the Duty to Affirmatively Further Fair Housing*, 66 N.Y.U. ANN. SURV. AM. L. 75, 77 (2010).

14. *See, e.g.*, *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs (Inclusive Cmty. II)*, 860 F. Supp. 2d 312 (N.D. Tex. 2012); *see also* Long,

Paul, the central cities of the area, utilize and continue to refine a QAP that is neither integrative nor cost-effective.<sup>15</sup> Instead of fulfilling its FHA obligations, the current Twin Cities QAP awards points to segregative areas by the very nature of its scoring system.<sup>16</sup> This program serves not as a means to further fair housing, but rather favors expensive placements in segregated areas or communities in danger of re-segregating.<sup>17</sup> Because the FHA is about community-wide, long-term integration, affordability need not be limited to affordable rents; it can also extend to overall development costs.<sup>18</sup> Expensive community development projects, absent integration, are impermissible under the FHA.<sup>19</sup>

Section II begins by discussing the development of the Fair Housing Act, the LIHTC and QAP programs, and the FHA's proposed Affirmatively Furthering Rule.<sup>20</sup> Next, Section III uses the Twin Cities to demonstrate the problematic nature of an improperly drafted QAP—an issue that permeates America's metropolitan regions. Section III adds to preexisting discussions of segregative QAPs, but introduces a cost-based analysis to the argument for integrative placements.<sup>21</sup> This Section concludes by proposing that the Twin Cities redraft the QAP to properly fulfill FHA obligations, specifically by examining its own errors and lessons from other jurisdictions.

The purpose of this Note is three-fold: (1) to explain how a poorly-drafted QAP can disguise segregative development; (2) to demonstrate that expensive units focused on community improvement rather than integration violate FHA obligations; and (3) to aid in drafting a QAP that reflects the obligation to create balanced and integrated living patterns. The Twin Cities use a non-integrative and costly QAP.<sup>22</sup> In order to fulfill obligations

---

*supra* note, 13 at 83–84 (noting that some regions, including the Newark metropolitan area, locate most of their allocated LIHTC in high poverty areas).

15. See Minneapolis/Saint Paul Housing Finance Board, *Minneapolis/Saint Paul Housing Finance Board Low Income Housing Tax Credit Qualified Allocation Plan (2014)*, <http://www.minneapolismn.gov/www/groups/public/@cped/documents/webcontent/wcms1p-108463.pdf> (last visited Oct. 15, 2013).

16. *Id.*

17. See *Self-Scoring Worksheet, 2013 Housing Tax Credit Program*, MINN. HOUS. FIN. AGENCY, [http://www.mnhousing.gov/ide/groups/multifamily/%20.%20.%20.%20/mhfa\\_012480.rtf](http://www.mnhousing.gov/ide/groups/multifamily/%20.%20.%20.%20/mhfa_012480.rtf) (last visited Oct. 15, 2013).

18. See *infra* discussion pp. 310–315.

19. *Id.*

20. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 139, 43710–43 (proposed July 19, 2013) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, & 903) [hereinafter AFFH].

21. See *infra* Part III.

22. See *Self-Scoring Worksheet, 2013 Housing Tax Credit Program*, *supra* note

under the FHA, Minneapolis and St. Paul—and other communities—must redraft their current QAP. Affordable housing developments, made possible under the FHA, become neither fair nor affordable when left unmonitored for FHA violations—the FHA requires non-discrimination and integration, not expensive community development.<sup>23</sup>

## II. Background: The Development of Integrative Affordable Housing

The Civil Rights Movement bred numerous tools intended for integrative development.<sup>24</sup> Before addressing their abuses and pitfalls in Section III, this Note begins by chronologically addressing these tools' backgrounds and developments. First, Congress enacted the Fair Housing Act to combat discriminatory housing practices against minority groups; throughout the years, case law has refined the FHA's negative and positive obligations. Second, in an effort to implement the Act, the LIHTC and the QAP coexist to site affordable housing developments in particular, potentially suspect, communities. Finally, a rule proposed in July of 2014—Affirmatively Furthering Fair Housing ("AFFH")—attempts to implement the FHA more effectively.

### A. *History, Obligations, and Developments of the Fair Housing Act and HUD Regulations*

Four years after the passage of the Civil Rights Act of 1964, President Lyndon B. Johnson signed the Civil Rights Act of 1968.<sup>25</sup> In an effort to combat increased patterns of housing segregation, the latter piece of legislation included Title VIII, more commonly known as the Fair Housing Act.<sup>26</sup> Before the FHA's passage, Congress considered a fair housing bill but struggled to pass such

---

17; see also *Minneapolis/Saint Paul Housing Finance Board, Minneapolis/Saint Paul Housing Finance Board Low Income Housing Tax Credit Qualified Allocation Plan* (2014), <http://www.minneapolismn.gov/www/groups/public/@cped/documents/webcontent/wcms1p-108463.pdf> (last visited Oct. 15, 2013) [hereinafter *Twin Cities QAP*].

23. Fair Housing Act of 1968 § 804, 42 U.S.C. § 3604(d) (2012).

24. Wendell E. Pritchett, *Where Shall We Live? Class and the Limitations of Fair Housing Law*, 35 URB. LAW. 399, 402 (2003) (noting activist accomplishments in "the New York State Committee on Discrimination in Housing and the National Committee Against Discrimination in Housing, were important institutions that provided models for the emerging civil rights movement").

25. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified in scattered sections of 42 U.S.C.) [hereinafter 1968 Civil Rights Act].

26. Fair Housing Act of 1968 § 804, 42 U.S.C. §§ 3602–19 (2012).

legislation.<sup>27</sup> In 1968, President Johnson used the emotional momentum from Dr. Martin Luther King, Jr.'s April assassination to catalyze the bill's passage.<sup>28</sup> President Johnson signed the Civil Rights Act of 1968 into law only a week after King's death.<sup>29</sup>

Through the FHA, Congress introduced federal enforcement mechanisms against discriminatory housing practices, stating, "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."<sup>30</sup> Since 1968, the Secretary of Housing and Urban Development possesses the authority to administer the FHA,<sup>31</sup> and "[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes."<sup>32</sup> These purposes include the FHA's negative and positive obligations.<sup>33</sup>

#### 1. Obligations Not to Discriminate Under the Fair Housing Act

Unless a development meets one of the FHA's exemptions, the FHA forbids discriminatory housing practices.<sup>34</sup> These

27. See, e.g., 114 CONG. REC. 4048 (1968); 114 CONG. REC. 3805 (1968); 114 CONG. REC. 3421 (1968).

28. *History of Fair Housing*, U.S. DEPT OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opportunity/abouttheo/history](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opportunity/abouttheo/history) (last visited Oct. 22, 2013) [hereinafter *History of Fair Housing*].

29. *Id.*

30. 42 U.S.C. § 3601 (2012).

31. *Id.* § 3608(a).

32. *Id.* § 3608(d).

33. *Thompson v. U.S. Dept. of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 456–59 (D. Md. 2005).

34. However, the FHA's prohibitions apply to sale or rental of certain dwellings:

(A) dwellings owned or operated by the Federal Government; (B) dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government, [subject to certain timing and payment stipulations]; (C) dwellings provided in whole or in part by loans insured, guaranteed, or otherwise secured by the credit of the Federal Government, [subject to certain payment, timing, and institution stipulations]; and (D) dwellings provided by the development or the redevelopment of real property purchased, rented, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under loan or grant contracts entered into after November 20, 1962.

42 U.S.C. § 3603(a)(1)(A)–(D) (2012). Certain dwellings are exempt from the application of Section 3604. See *id.* § 3603(b).

proscriptions are the negative obligations of the FHA.<sup>35</sup> It is unlawful under the FHA to refuse to rent or sell, or to refuse to negotiate for the sale or rental of, a dwelling to a person because of race.<sup>36</sup> The FHA also protects against discrimination in terms and conditions of sale or rental.<sup>37</sup> The FHA prohibits advertising expressing racial preference or disfavor<sup>38</sup> and misrepresenting the availability of a unit.<sup>39</sup> Finally, one may not, “[f]or profit . . . induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race . . . .”<sup>40</sup>

Furthermore, the FHA establishes liability for practices not motivated by race—if discriminatory in effect, the practice violates the FHA.<sup>41</sup> “A practice has a discriminatory effect where it *actually or predictably* results in a disparate impact on a group . . . or creates, increases, reinforces, or perpetuates segregated housing patterns because of race . . . .”<sup>42</sup> If “legally sufficient justification”<sup>43</sup> is adequately shown, a discriminatory effect is permissible.<sup>44</sup> However, no “sufficient legal justification” defense exists against claims of intentional discrimination.<sup>45</sup>

As the law surrounding the FHA developed, it became clear that affirmatively furthering fair housing requires more than proscribing discrimination.<sup>46</sup> Because the FHA contains the

35. *Id.* § 3603(a). It is important to note that although the FHA enumerates the protected classes it seeks to protect and that each of these classes enjoys protection, this Note concentrates on race.

36. 42 U.S.C. § 3604(a) (2012).

37. *Id.* § 3604(b).

38. *Id.* § 3604(c).

39. *Id.* § 3604(d).

40. *Id.* § 3604(e).

41. 24 C.F.R. § 100.500 (2013). This “negative obligation” closely relates to the positive obligation to integrate.

42. *Id.* § 100.500(a) (emphasis added).

43. *Id.* § 100.500(b) (“(1) A legally sufficient justification exists where the challenged practice: (i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. [§] 3612, or defendant, with respect to claims brought under 42 U.S.C. [§§] 3613 or 3614; and (ii) Those interests could not be served by another practice that has a less discriminatory effect. (2) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.”).

44. *Id.* § 100.500(c).

45. *Id.* § 100.500(d).

46. There are countless cases discussing violations of the obligation not to discriminate. *See, e.g.,* McDonald v. Coldwell Banker, 543 F.3d 498 (9th Cir. 2008); Charleston Hous. Auth. v. U.S. Dep’t of Agric., 419 F.3d 729 (8th Cir. 2005); United States v. Starrett City Assocs., 840 F.2d 1096, 1100 (2d Cir. 1988); Robinson v. 12

positive obligation to further fair housing, actions can violate the FHA even if unmotivated by discrimination.<sup>47</sup> An analysis of this positive obligation is central to an evaluation of QAP, eventual development placement, and these developments' costs.

## 2. An Affirmative Obligation to Integrate Under the Fair Housing Act

The United States Department of Housing and Urban Development ("HUD") is responsible for regulating the site and neighborhood standards of public housing projects.<sup>48</sup> In 1968, Congress charged HUD with the authority to implement programs and activities in a manner that affirmatively furthers fair housing.<sup>49</sup> Case law developed two important clarifications surrounding the positive obligation: (1) housing authorities must consider racial concentration before siting projects because (2) racial integration is a long-term, community-wide responsibility.<sup>50</sup>

Courts quickly interpreted the "affirmatively to further" mandate as one that required consideration of a community's racial composition.<sup>51</sup> In *Shannon v. United States Department of*

---

Lofts Realty, Inc., 610 F.2d 1032, 1036–37 (2d Cir. 1979); *United States v. Hylton*, 944 F. Supp. 2d 176, 188 (D. Conn. 2013); *Boykin v. Gray*, 895 F. Supp. 2d 199, 218 (D.D.C. 2012). For a discussion on how poor public policy choices compounded segregation and made segregation the norm in the United States, see Sheryll D. Cashin, *Civil Rights in the New Decade: The Geography of Opportunity*, 31 CUMB. L. REV. 467, 469 (2001) (asserting that "racial and socio-economic segregation, as opposed to integration, is now entrenched as the seemingly natural order"). However for purposes of this Note, focus is on the affirmative obligation to integrate.

47. See, e.g., *Hallmark Devs., Inc. v. Fulton Cnty., Ga.*, 466 F.3d 1276, 1283 (11th Cir. 2006) (citing Civil Rights Act of 1968 § 804(a), 42 U.S.C.A. § 3604(a)) (finding that "circumstantial evidence must often be used to establish the requisite intent. Among the factors that are instructive . . . are discriminatory or segregative effect, historical background, the sequence of events leading up to the challenged actions, and whether there were any departures from normal or substantive criteria") (citing *United States v. Hous. Auth. of City of Chickasaw*, 504 F. Supp. 716, 727 (S.D. Ala. 1980)); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988) (finding "[the] refusal to amend the restrictive zoning ordinance to permit privately-built multi-family housing outside the urban renewal area significantly perpetuated segregation in the Town"); *Davis v. Wells Fargo Bank*, 685 F. 2d 838, 846 (N.D. Ill. 2010) *aff'd sub nom*, *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529 (7th Cir. 2011) (finding plaintiffs could not make a showing of "a disproportionate effect on minority neighborhoods"); *Jackson v. City of Auburn, Ala.*, 41 F. Supp. 2d 1300, 1310 (M.D. Ala. 1999) (finding plaintiffs failed to establish disparate enforcement of zoning ordinances).

48. 42 U.S.C. § 3608(d) (2012).

49. *Id.* § 3608(d).

50. See *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973); *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809 (3d Cir. 1970).

51. *Shannon*, 436 F.2d at 809.



*Housing and Urban Development*, the Third Circuit held that placement of affordable housing in racially segregated areas or re-segregating areas constituted a prima facie violation of the FHA.<sup>52</sup> Plaintiffs in *Shannon* contended that the planned HUD-funded project failed to consider racial composition, thereby threatening to increase racial and economic segregation in the area.<sup>53</sup> The court held the FHA, read together with other acts, demonstrated "a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight."<sup>54</sup> *Shannon* most notably acknowledged that the FHA not only prohibits discrimination based on race, but also grants HUD responsibility to take affirmative steps to prevent segregation, including an evaluation of the proposed siting's racial composition.<sup>55</sup> "Housing practices unlawful under Title VIII include not only those motivated by a racially discriminatory purpose, but also those that disproportionately affect minorities."<sup>56</sup>

Furthermore, if the effect of a siting is re-segregation or continued segregation the housing authority must build the units elsewhere even though the siting may benefit some racial minorities.<sup>57</sup> Such was the holding of *Otero v. New York City Housing Authority* decided by the Second Circuit<sup>58</sup> three years after *Shannon*.<sup>59</sup> *Otero* held that the "purpose of racial integration is to benefit the community . . . not just certain of its members."<sup>60</sup> An increase or maintenance of segregative housing patterns may immediately benefit a minority group.<sup>61</sup> But the affirmative duty

---

52. *Id.* at 820.

53. *Id.* at 812.

54. *Id.* at 816.

55. *Id.*

56. *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1100 (2d Cir. 1988).

57. *See Otero v. N.Y.C Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973).

58. *Id.*

59. *Id.*

60. *Id.* at 1134.

61. In *Otero*, New York City Housing Authority ("Authority") conducted an urban renewal project that required residents to leave the area during the revitalization process. *Id.* at 1125-26. The Authority failed to adhere to its promise to give former residents, many of whom were non-White, first priority to reside in the new public housing project. *Id.* The Authority contended its adherence would "create a non-white 'pocket ghetto' that would operate as a racial 'tipping factor' causing white residents to take flight and leading eventually to non-white ghettoization of the community." *Id.* at 1124. *Otero* held, agreeing with the Authority, that integration requires not just introduction of non-Whites into predominantly White areas, but also Whites into predominantly non-White areas. *Id.* at 1140.

to promote integrative housing is not to be set aside just because racial minorities accept housing in segregated or re-segregating communities.

There may be some instances in which a housing decision will permissibly result in greater racial concentration because of the overriding importance of other imperative factors in furtherance of national housing goals. But Congress' desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing, even though the effect in some instances might be to prevent some members of a racial minority from residing in publicly assisted housing in a particular location.<sup>62</sup>

*Otero* prohibits shortsighted placements.<sup>63</sup> Similarly, in *Gautreaux v. Chicago Housing Authority*, the Seventh Circuit held that Chicago's public housing program must include the entire metropolitan area, not just the city of Chicago.<sup>64</sup> "All of the parties, the Government officials, the documentary evidence, the sole expert and the decided cases agree that a suburban or metropolitan area plan is the *sine qua non* of an effective remedy."<sup>65</sup> The positive obligation is a long term, far-reaching goal.<sup>66</sup>

The current HUD Code forbids the siting of new affordable units in two circumstances—these prohibitions serve as affirmative actions against segregation. First, HUD proscribes siting in areas of minority concentration.<sup>67</sup> Second, it proscribes siting in a racially mixed area if it will cause a significant increase in the proportion of minorities to non-minorities.<sup>68</sup> According to the Code, an exception exists, but only to the first proscription:

- (3) The site for new construction shall not be located in an area of minority concentration unless:
  - (i) There are already sufficient, comparable opportunities outside areas of minority concentration for housing minority families in the income range that is to be served by the proposed project; or
  - (ii) The project is necessary to meet overriding housing needs that cannot feasibly be met otherwise in that

---

62. *Id.* at 1134.

63. *Id.*

64. *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930, 938–39 (7th Cir. 1974) ("The realities of 'White flight' to the suburbs and the inevitability of 'resegregation' by rebuilding the ghettos as [Chicago Housing Authority] and HUD were doing in Chicago must therefore be considered in drawing a comprehensive plan.").

65. *Id.*

66. *NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987).

67. 24 C.F.R. § 905.602(d)(3) (2014).

68. *Id.* § 905.602(d)(4) (2014).

housing market area. 'Overriding housing needs' shall not serve as the basis for determining that a site is acceptable if the only reason that these needs cannot otherwise feasibly be met is that, due to discrimination because of race, color, religion, creed, sex, disability, familial status, or national origin, sites outside areas of minority concentration are unavailable.

- (4) The site for new construction shall not be located in a racially mixed area if the project will cause a significant increase in the proportion of minority to nonminority residents in the area.<sup>69</sup>

The current Code reflects case law developments and clearly prohibits siting in areas of minority concentration or in areas in danger of re-segregating.<sup>70</sup> The LIHTC program and the federally-mandated QAP work together to further the affirmative obligation to integrate.

### *B. The Low-Income Housing Tax Credit Program and the Qualified Allocation Plan*

To incentivize private developers to build affordable housing developments, Congress created the LIHTC program under the Tax Reform Act of 1968.<sup>71</sup> The LIHTC is the largest U.S. program providing property-based subsidies to rental housing.<sup>72</sup> The program provides developers with credits, which in turn, sell the credits to raise either capital or equity for projects.<sup>73</sup> Because a developer does not have to borrow funds, its debt is lower, and consequently, prospective tenants pay lower rents.<sup>74</sup> A compliant LIHTC program property can receive a dollar-for-dollar credit against its federal tax liability each year up to the period during

69. *Id.* § 905.602(d)(3)–(4) (2014).

70. *Id.*

71. I.R.C. § 42 (2013).

72. U.S. DEPT OF HOUS. & URBAN DEV. SUBMITTED BY ABT ASSOCIATES INC. IN PARTNERSHIP WITH VIVA CONSULTING, WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND? 2 (2012), available at [http://www.huduser.org/publications/pdf/what\\_happens\\_lihtc.pdf](http://www.huduser.org/publications/pdf/what_happens_lihtc.pdf) (stating that in recent years, it is estimated that LIHTC produced approximately 100,000 units). However, other examples of potential funding include HOME Funds and funding from the Community Development Block Grant ("CDBG") program. See, e.g., *Funds Available*, U.S. DEPT OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/administration/grants/fundsavail](http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/grants/fundsavail) (last visited Nov. 30, 2013).

73. *How Do Housing Tax Credits Work?*, U.S. DEPT OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/affordablehousing/training/web/lihtc/basics/work](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/training/web/lihtc/basics/work) (last visited Oct. 19, 2013) [hereinafter *How LIHTC Work*].

74. *Id.*

which the units must remain affordable, up to fifteen-years.<sup>75</sup> The IRS annually allocates LIHTC to state agencies, and ultimately, state agencies allocate LIHTC to developers.<sup>76</sup>

Because each state's LIHTC are limited each year, allocation of the credits is both strategic and competitive.<sup>77</sup> In order to utilize LIHTC, a state must have a QAP.<sup>78</sup> The QAP awards credits (or points) that ultimately determine how and where to allocate LIHTC.<sup>79</sup> Therefore, because a state can draft its QAP in such a way as to further its specific housing goals by targeting development placement in certain locations, it wields a significant amount of freedom to effectuate its preferences.<sup>80</sup> For example, Minnesota Housing awards points in varying amounts for rehabilitating an existing structure, utilizing existing sewer and water lines, siting in higher income communities close to jobs, and for "financial readiness to proceed."<sup>81</sup> And although an agency awards points in varying amounts for its various selection priorities, a housing authority can inappropriately allocate LIHTC.<sup>82</sup> A recent case in Texas demonstrates that QAP creating a disparate impact fail to meet FHA's positive obligations.<sup>83</sup>

#### 1. Texas Housing Tax Credit Program and the Fair Housing Decision

The Texas Department of Housing and Community Affairs ("TDHCA") developed a QAP to administer its LIHTC funds.<sup>84</sup> In 2010, Inclusive Communities Project, Inc. ("ICP"), a Dallas-based non-profit housing organization, alleged TDHCA perpetuated

---

75. *Id.*; 42 U.S.C. § 42(h)(6)(d) (2013).

76. *Allocating Housing Tax Credits*, U.S. DEPT OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/affordablehousing/training/web/lihtc/basics/allocating](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/training/web/lihtc/basics/allocating) (last visited Oct. 19, 2013) [hereinafter *Allocating LIHTC*].

77. *Id.* For example, in 2007, New Jersey developers applied for nearly \$50 million in LIHTC, while the state's allotted credits totaled under \$20 million. Long, *supra* note 13, at 83.

78. 26 U.S.C. § 42(m) (2013).

79. *See, e.g.*, MINN. STAT. § 462A.222 (2013). *See infra* Part III for an in-depth discussion of Minneapolis and St. Paul's Qualified Allocation Plan.

80. *See* 26 U.S.C. § 42(m) (2013).

81. *Self-Scoring Worksheet, 2013 Housing Tax Credit Program*, *supra* note 17.

82. *See generally Inclusive Cmty. II*, 860 F. Supp. 2d 312 (N.D. Tex. 2012); *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs (Inclusive Cmty. I)*, 749 F. Supp. 2d 486 (N.D. Tex. 2010).

83. *Inclusive Cmty. II*, 860 F. Supp. 2d at 312; *Inclusive Cmty. I*, 749 F. Supp. 2d at 486.

84. *Inclusive Cmty. I*, 749 F. Supp. 2d at 492.

segregation and discrimination through its LIHTC allocations.<sup>85</sup> ICP alleged TDHCA “disproportionately approved tax credits for low-income housing in minority neighborhoods and ha[d] denied applications for non-elderly low-income housing in predominately Caucasian neighborhoods.”<sup>86</sup> ICP contended TDHCA’s actions violated not only Sections 3604(a)<sup>87</sup> and 3605(a)<sup>88</sup> of the FHA, but also the Fourteenth Amendment’s Equal Protection Clause and 42 U.S.C. § 1982.<sup>89</sup> The parties cross-motined for summary judgment.<sup>90</sup>

The court granted partial summary judgment in favor of ICP on the FHA claim.<sup>91</sup> ICP provided evidence TDHCA disproportionately approved applications for LIHTC credits in minority neighborhoods, which caused a disparate racial impact.<sup>92</sup> The court found that ICP established its prima facie case of discriminatory impact for its FHA claim.<sup>93</sup> Therefore, the burden shifted to TDHCA to show that its actions were “in furtherance of a compelling government interest,” that the interest was “bona fide and legitimate,” and there were “no less discriminatory alternatives.”<sup>94</sup> TDHCA argued that its placements were legitimate:

---

85. *Id.* at 493.

86. *Id.* (alleging that “92% percent [sic] of all LIHTC units in the city of Dallas are in census tracts where more than one-half of the population is minority; that TDHCA has discretion in determining which proposed projects receive tax credits, and that TDHCA improperly takes race into account (both of the neighborhood and potential residents), perpetuating racial segregation in Dallas housing”).

87. [I]t shall be unlawful—(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a) (2012).

88. It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

42 U.S.C. § 3605(a) (2012).

89. Actionable under 42 U.S.C. § 1983 (2012).

90. *Inclusive Cmty. II*, 860 F. Supp. 2d 312, 493 (N.D. Tex. 2012). Specifically, ICP contended the following: (1) TDHCA’s making housing and financial assistance unavailable because of race violated the FHA, and (2) TDHCA violated the Fourteenth Amendment by using race as a factor in LIHTC allocations, actionable under 42 U.S.C. §§ 1982–83.

91. *Id.* at 507. An action under the FHA may proceed under either a theory of disparate treatment or disparate impact. *See* NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988), *aff’d*, 488 U.S. 15 (1988).

92. *Inclusive Cmty. I*, 749 F. Supp. 2d 486, 500 (N.D. Tex. 2010).

93. *Id.* at 504.

94. *Id.* at 503.

[T]he concentration of LIHTC developments in the inner-areas serves a compelling government interest; that 26 U.S.C. § 42, the statute that establishes the low-income housing tax credits, compels [TDHCA] to locate developments in the most impoverished areas; that it is impossible for defendants to comply with § 42 and achieve ICP's request that 50% of LIHTC developments be located in the suburbs; and that to the extent they conflict, § 42 controls over the FHA and § 1982.<sup>95</sup>

The court held that TDHCA failed to establish that it could not comply with Section 42 in a less discriminatory way,<sup>96</sup> and therefore denied TDHCA's motion for summary judgment on the FHA claims.<sup>97</sup> “[C]ourts have held that actions that cause disproportionate harm to African-Americans and produce a segregative impact on the entire community create a strong prima facie case [of discrimination under the FHA].”<sup>98</sup>

ICP also alleged that TDHCA violated the Equal Protection Clause of the Fourteenth Amendment by intentionally classifying according to race.<sup>99</sup> However, the court noted that under the Equal Protection Clause, discriminatory effect alone is not sufficient—rather, while discriminatory effect is not irrelevant, ICP needed to demonstrate discriminatory intent.<sup>100</sup> The court found that ICP presented enough evidence, both circumstantial and direct, showing TDHCA discriminated on the basis of race.<sup>101</sup> The court also found that the ICP established its prima facie case of discriminatory effect, thereby shifting the burden to the TDHCA to “articulate a legitimate, nondiscriminatory reason for their actions.”<sup>102</sup> TDHCA argued that 26 U.S.C. § 42 specifically encourages placements in impoverished neighborhoods and that these neighborhoods are minority-concentrated.<sup>103</sup> Because TDHCA produced a non-discriminatory reason for its action, the

---

95. *Id.*

96. *Id.* at 504.

97. *Id.* at 504.

98. *Id.* at 500.

99. *Id.* at 501.

100. *Id.*; *See also* Vill. of Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 266 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”).

101. *Inclusive Cmty. I*, 749 F. Supp. 2d at 502 (stating that ICP presented statistical and comparative evidence, evidence of a suspect sequence of events, that the TDHCA employed a subjective decision-making process, and contemporary statements by TDHCA officials indicating that race influenced its actions).

102. *Id.* at 504.

103. *Id.* at 505.

burden shifted back to ICP.<sup>104</sup> The court denied TDHCA's motion for summary judgment because genuine issues of material fact existed.<sup>105</sup>

Therefore, in 2010, the court held ICP was entitled to partial summary judgment by establishing the prima facie case's components of its FHA and Fourteenth Amendment claims.<sup>106</sup> The parties presented their case in a bench trial to determine whether TDHCA either intentionally discriminated on the basis of race in violation of the Fourteenth Amendment's Equal Protection Clause and the Property Rights of Citizens' statute, 42 U.S.C. § 1982, or whether TDHCA's LIHTC allocations had a disparate racial impact and, thus, violated Sections 3604(a) and 3605(a) of the FHA.<sup>107</sup> The court held ICP failed to prove TDHCA intentionally discriminated on the basis of race when allocating LIHTC, and therefore, ICP failed to prove intentional discrimination under the Fourteenth Amendment.<sup>108</sup> However, ICP established its FHA discriminatory impact claim.<sup>109</sup>

Because ICP made a prima facie showing of disparate impact, the burden shifted.<sup>110</sup> Consequently, TDHCA now needed to show, by a preponderance of evidence, its actions furthered a legitimate government interest.<sup>111</sup> Thus, TDHCA had to prove two elements: (1) that its interest was both bona fide and legitimate and (2) no less discriminatory means were available.<sup>112</sup> The housing agency offered that it had legitimate governmental interests, namely complying with state and federal laws.<sup>113</sup> The court assumed the proffered interests were bona fide and legitimate, but TDHCA argued neither that alternative means were unavailable nor that a non-discriminatory allocation plan would hinder its interests.<sup>114</sup> In Texas, housing authorities used the prominent LIHTC program,

---

104. *Id.*

105. *Id.* at 507.

106. *Id.*

107. *Inclusive Cmty. II*, 860 F. Supp. 2d 312, 332 (N.D. Tex. 2012).

108. *Id.* at 321.

109. *Id.* at 332.

110. *Id.* at 322. "In particular, the court relied on evidence that, 'from 1999–2008, TDHCA approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas.'" *Id.* (quoting *Inclusive Cmty. I*, 749 F. Supp. 2d at 499).

111. *Inclusive Cmty. II*, 860 F. Supp. 2d at 322 (citing *NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988)).

112. *Inclusive Cmty. II*, 860 F. Supp. 2d at 322–23.

113. *Id.* at 323.

114. *Id.* at 326.

which has the potential to integrate and promote development in minority-concentrated areas.<sup>115</sup>

C. “Affirmatively Furthering Fair Housing”

The Fair Housing Act has proven less effective than desired.<sup>116</sup> As Professor John A. Powell noted:

[T]he Fair Housing Act itself, and the anti-discrimination orientation that it conveys, is part and parcel of the problem. The Act itself was largely symbolic . . . The orientation of the Act itself may be an obstacle to fulfilling its vision of fair housing . . . . [The Act’s] provisions *may increase the freedom of choice* for homebuyers, but have not necessarily helped produce integrated neighborhoods or addressed segregated living patterns.<sup>117</sup>

Despite the growth in homeownership among persons of color, African Americans remain highly segregated, particularly in urban areas.<sup>118</sup> Estimates in 2000 suggested a staggering 65% of African Americans living in metropolitan areas would have to relocate to accomplish full integration.<sup>119</sup>

To combat the FHA’s shortcomings, HUD proposed a new rule on July 19, 2013 to provide a more effective means to further the FHA, namely Affirmatively Furthering Fair Housing (“AFFH”).<sup>120</sup> The new rule lacks specifics beyond requiring that HUD gather nationwide data, which participants can use as a starting point to improve their communities.<sup>121</sup> HUD and its participants base the analysis on four goals.<sup>122</sup>

115. *Id.* at 327 n.23.

116. See John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 606 (2008). See AFFH, *supra* note 20, at 43710–11.

117. Powell, *supra* note 116, at 606 (emphasis added).

118. *Id.* at 608.

119. *Id.* at 608–09.

120. AFFH, *supra* note 20, at 43710.

121. *Id.* at 43711 (“The proposed rule does not mandate specific outcomes for the planning process. Instead, recognizing the importance of local decision-making, it establishes basic parameters and helps guide public sector housing and community development planning and investment decisions to fulfill their obligation to affirmatively further fair housing.”).

122. *Id.* (“[T]he rule seeks to make program participants more empowered to foster the diversity and strength of communities and regions by [1] improving integrated living patterns and overcoming historic patterns of segregation, [2] reducing racial and ethnic concentrations of poverty, and [3] responding to identified disproportionate housing needs of persons protected by the Fair Housing Act . . . [and] [4] reducing disparities in access to key community assets based on race, color, religion, sex, familial status, national origin, or disability . . .”).



As QAPs go unchallenged, communities remain entrenched in segregation.<sup>123</sup> Areas in danger of re-segregating are tipping towards minority-concentration.<sup>124</sup> The Twin Cities Metropolitan Area exemplifies this reality—the LIHTC, despite its integrative intentions, suffers from a QAP that affirmatively furthers segregative and expensive housing developments. Numerous similarities exist between *Inclusive Communities I* and *II* and the Twin Cities QAP regarding the segregative use of LIHTC, but in addition, the Twin Cities used their QAP to build expensive units based improperly on community improvement.

### III. Analysis: The Problematic QAP in the Twin Cities

Before discussing the problems embedded in the Twin Cities QAP, this Analysis outlines Minneapolis and St. Paul QAP basics. The Analysis then discusses two problems with the QAP: (1) it favors placements in minority-concentrated areas, and (2) it allows siting segregative placements in a costly manner through community improvement efforts. While the former problem finds its roots in the drafting of the Twin Cities QAP itself, the costs associated with these non-integrative developments further violate FHA obligations by allowing community development regimes to replace integrative obligations. The Analysis concludes by applying lessons from the recent *Inclusive Communities II* decision to the problems facing the Twin Cities.

#### A. The Current Twin Cities QAP

Section 42(m) of the Internal Revenue Code (“Code”) requires that the Twin Cities’ housing tax credit agencies develop and adopt a qualified allocation plan.<sup>125</sup> The Twin Cities QAP, like other QAPs, sets forth the selection criteria used in determining housing priorities, particularly by giving priorities and preferences “as a condition to allocating Low Income Housing Tax Credits . . . to housing projects.”<sup>126</sup> The QAP gives preference in allocating LIHTC to the following:

- (1) projects serving the lowest income tenants;
- (2) projects contractually obligated to serve qualified tenants for the longest periods; and

---

123. Long, *supra* note 13, at 83.

124. *Id.* at 91. (citing *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 812 (3d Cir. 1970)).

125. *Twin Cities QAP*, *supra* note 22.

126. *Id.* at art. I.

- (3) projects located in a Qualified Census Tract<sup>127</sup> that are part of a cooperatively developed plan that provides for community revitalization.<sup>128</sup>

Under Section 42(m)(1)(C) of the Code, allocating LIHTC requires the examination of certain factors within the selection criteria for housing projects.<sup>129</sup> The Twin Cities QAP incorporates eight criteria from the Code.<sup>130</sup> The QAP also sets forth selection criteria for determining housing priorities appropriate to local conditions and provides a procedure for monitoring compliance.<sup>131</sup>

The Twin Cities QAP explicitly discusses the FHA. It notes that participants must use affirmative fair housing marketing practices in “soliciting renters, determining eligibility, and concluding all transactions as addressed in Title VIII of the Civil Rights Act of 1968.”<sup>132</sup> The QAP then outlines what is unlawful, namely the FHA’s negative obligations not to discriminate.<sup>133</sup>

The Minneapolis/Saint Paul Housing Finance Board (“Board”)<sup>134</sup> allocates the LIHTC available in Minnesota.<sup>135</sup> The

127. Defined as follows:

(I) The term ‘qualified census tract’ means any census tract . . . designated by the Secretary of Housing and Urban Development . . . in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent . . . . (II) The portion of a metropolitan statistical area which may be designated for purposes of this subparagraph shall not exceed an area having 20 percent of the population of such metropolitan statistical area. (III) For purposes of this clause, each metropolitan statistical area shall be treated as a separate area and all nonmetropolitan areas in a State shall be treated as 1 area.

26 U.S.C. § 42(d)(5)(B)(ii) (2013).

128. *Twin Cities QAP*, *supra* note 22, at art. III(A).

129. *Id.* at art. III(B).

130. *Id.* (“(1) project location; (2) housing needs characteristics; (3) project characteristics; (4) sponsor characteristics; (5) tenant populations with special housing needs; (6) public housing waiting lists; (7) tenant populations of individuals with children; and (8) projects intended for eventual tenant ownership.”).

131. *Id.* at art. III(D)–(E). See Minneapolis/Saint Paul Housing Finance Board, *2015 Housing Tax Credit Program Procedural Manual*, MINNEAPOLIS/ST. PAUL HOUS. FIN. BD., <http://www.minneapolismn.gov/www/groups/public/@cped/documents/webcontent/wcms1p-108463.pdf> (last visited Sept. 30, 2013).

132. *Id.* at art. VI(H).

133. *Id.*

134. MINN. STAT. § 462A.221 subd. 1(a) (2013).

135. The 2014 estimate LIHTC amounts are \$1,376,364 for Minneapolis and \$1,025,857 for St. Paul. Minneapolis/Saint Paul Housing Finance Board, *2014 Low Income Housing Tax Credit Procedural Manual*, MINNEAPOLIS/SAINT PAUL HOUS. FIN. BD., <http://www.stpaul.gov/DocumentCenter/View/65561> (last visited Sept. 30, 2013).

Board annually awards LIHTC through two competition rounds.<sup>136</sup> “First round” allocation procedure entails not only timely submission, but also certain threshold requirements.<sup>137</sup> Metropolitan area projects must consist of new construction or substantial rehabilitation for (1) projects in which at least 75% of LIHTC units are single-room occupancy, efficiency, or one bedroom and are affordable by households whose income does not exceed 30% of the median income; (2) projects not restricted to persons fifty-five years of age or older, at least 75% of LIHTC units contain two or more bedrooms, one-third of that 75% must contain three or more bedrooms; or (3) simply substantial rehabilitation of projects the city targets for revitalization.<sup>138</sup> If the metropolitan area project meets the threshold requirement, the Board then rates the project according to its preference priority point system, outlined in Article IX of the QAP.<sup>139</sup> Priority points are awarded for favorable development characteristics described in LIHTC applications. The Twin Cities QAP rates those projects receiving the most points first, and therefore, these projects receive LIHTC allocations.

### *B. The Twin Cities QAP Is Both Segregative and Costly*

The Twin Cities QAP does not mention the affirmative obligation to build integrative developments. Saint Paul awards a maximum of 237 priority points, their nature means nearly 200 points are in favor of central city developers.<sup>140</sup> For example, the QAP awards the most points to the projects with the following characteristics:

- provides support services for homeless occupants;
- provides housing for the mentally ill, the developmentally disabled, those with drug dependencies, those with brain injuries, the physically disabled, or those with HIV/AIDS-related illness;
- provides resident support services;

---

136. MINN. STAT. § 462A.222 subd. 3(a) (2013).

137. *Twin Cities QAP*, *supra* note 22, at art. VIII.

138. MINN. STAT. § 462A.222 subd. 3(d)(1)(i)–(iii). The statute also permits first-round applicants outside the metropolitan area, those rented to persons with serious and persistent mental illness, developmental disabilities, drug dependencies, brain injuries, or physical disabilities to certain requirements. MINN. STAT. § 462A.222, subd. 3(d)(2)–(3).

139. *Twin Cities QAP*, *supra* note 22, at art. VIII.

140. *Saint Paul's Self Scoring Worksheet for Selection Points (2014)*, MINNEAPOLIS/SAINT PAUL HOUS. FIN. BD., <http://www.stpaul.gov/DocumentCenter/View/65566> (last visited Oct. 27, 2014).

- a developer with a recommendation of support from a city recognized citizen participation community planning council;
- sites in “Neighborhood Stabilization Program” neighborhoods;
- preserves subsidized low-income housing;
- rehabilitates of existing buildings;
- utilizes other project-based funding sources;
- attracts private financing;
- sites within 0.25 miles of transit stops;
- develops with a high density of units;
- sites on Housing and Redevelopment Authority (“HRA”) owned land or on property which has outstanding HRA/City debt obligations; and
- promotes walkability to various daily amenities.<sup>141</sup>

Minnesota Housing’s self-scoring worksheet outlines many of the same selection criteria, adding some criteria such as siting near existing sewer and water lines, siting near higher income communities close to jobs, and favoring projects which have secured one or more other funding commitments.<sup>142</sup>

Awarding points in this manner benefits certain individuals and maybe even larger groups.<sup>143</sup> However, the current and proposed allocation scheme ignores the affirmative obligation to build integrative developments, because the QAP awards LIHTC credits to the central cities in a racially segregative manner.<sup>144</sup> Unfortunately, Minneapolis and St. Paul actions bolster prior concerns of segregative LIHTC allocations as the process awards no points for developments near high-achieving schools or pro-integrative developments.<sup>145</sup>

141. *Twin Cities QAP*, *supra* note 22, at art. IX.

142. *Self-Scoring Worksheet, 2013 Housing Tax Credit Program*, *supra* note 17.

143. Allocating points for sites near higher income communities that have better proximity to job opportunities can also translate into better school systems and stronger tax bases. See Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1759 (2005).

144. See Letter from Myron Orfield, Dir. of the Inst. on Metro. Opportunity, to Libby Starling, Dir. of Research (on file with the Inst. on Metro. Opportunity) [hereinafter Starling Letter].

145. See Long, *supra* note 13, at 76; Orfield, *supra* note 143, at 1759–60.

### 1. Segregative Development Through the Twin Cities QAP

The Twin Cities QAP awards points in a segregative manner as a vast majority of points are awarded in segregated or re-segregating communities. According to the Institute on Metropolitan Opportunity (“IMO”), in 2013 55% of all subsidized units in the Twin Cities Metropolitan Area were sited in neighborhoods that were at least 29% non-White, though they make up only 23% of total housing in that region.<sup>146</sup> The poverty rate in these neighborhoods is 23% compared to 6% in the rest of the region.<sup>147</sup> Saint Paul and Minneapolis show a stronger disparity; while subsidized housing makes up 55% of all housing units, 85% of those units were sited in at least 29% non-White neighborhoods.<sup>148</sup> Funneling large percentages of affordable housing in these areas rapidly increases minority concentration in segregated neighborhoods, impedes minority presence in predominantly White neighborhoods, and puts integrated neighborhoods in danger of re-segregating.<sup>149</sup>

In general, poor Blacks and Latinos residing in racially segregated cities and inner suburbs attend “overwhelmingly low income schools.”<sup>150</sup> Racial segregation shares deep ties to intergenerational poverty, negative health consequences, and other problems.<sup>151</sup> According to Professor Myron Orfield:

Children who grow up in predominately poor neighborhoods and attend very low income schools face many barriers to academic and occupational achievement, even if they themselves are not poor. . . . Concentrated poverty neighborhoods have very high crime rates, often multiples of the suburban violent crime rate, and huge health disparities resulting from the concentration of environmental hazards, stress, inadequate health care facilities, and poor quality, expensive food.<sup>152</sup>

Exposure to opportunity, instead of concentrated segregation and poverty, fosters numerous benefits.<sup>153</sup> If able to move to largely White, opportunity-rich suburbs, women with low incomes improve their employment and earnings, employment rates in

146. See Starling Letter, *supra* note 144.

147. *Id.*

148. *Id.*

149. *Id.*

150. Orfield, *supra* note 143, at 1760 (“[P]oor whites, who do not face housing discrimination and live more dispersed throughout suburbia, live in middle-income neighborhoods and attend middle-class schools.”).

151. Long, *supra* note 13, at 95.

152. Orfield, *supra* note 143, at 1760–61.

153. *Id.* at 1761–62.

general increase, and children fare significantly better academically in affluent suburban schools.<sup>154</sup> Integration enables long-term benefits;<sup>155</sup> desegregated elementary school attendees are more likely to attend “a desegregated college, live in a desegregated neighborhood, work in a desegregated environment, and possess high career aspirations.<sup>156</sup> A study of some of the nation’s most selective law schools showed that the vast majority of the students had attended desegregated colleges.”<sup>157</sup>

As the Board continues to site affordable housing in a non-integrative fashion, not only are neighborhoods affected but also schools. The Twin Cities’ subsidized housing exists largely near segregated or re-segregating schools.<sup>158</sup>

Sixty percent of the region’s subsidized housing was located near schools that were segregated (more than fifty percent non-white) . . . . Another twenty-five percent was near schools that were re-segregating (thirty to fifty percent of students non-white). Only sixteen percent of the region’s subsidized housing was located by schools that were predominantly white or stably integrated.<sup>159</sup>

Currently, segregated schools serve a little over a quarter of the region’s students, while predominantly White schools serve 54% of the region’s students.<sup>160</sup> LIHTC suburban participants sited 80% of their units in White or integrated areas.<sup>161</sup> In contrast, LIHTC urban participants sited 86% of their units in “neighborhoods with more than thirty percent minority” concentration and also “in areas with predominantly non-white, high poverty, low performing schools.”<sup>162</sup>

Under HUD’s current Code, housing authorities cannot approve new affordable units in areas of minority concentration.<sup>163</sup> In addition, housing authorities cannot approve new units in a racially mixed area that will cause a significant increase in the

---

154. *Id.* at 1762 (noting this result manifested without job training and/or placement services).

155. *Id.*

156. *Id.* at 1761–63.

157. *Id.* at 1763.

158. Starling Letter, *supra* note 144 (categorizing, for school demographic purposes, “predominantly white (schools with non-white shares between zero and thirty percent), integrated (non-white shares between thirty and fifty percent), and predominantly non-white (non-white shares greater than fifty percent)”).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. 24 C.F.R. § 905.602(d)(3) (2014).

proportion of minorities to non-minorities.<sup>164</sup> However, an exception does exist which would allow developers to build in areas of minority concentration—new construction may be built in an area of minority concentration if “(i) [t]here are already sufficient, comparable opportunities outside areas of minority concentration for housing minority families in the income range that is to be served by the proposed project; or (ii) [t]he project is necessary to meet overriding housing needs that cannot feasibly be met otherwise in that housing market area.”<sup>165</sup>

“Overriding needs” shall not serve as basis for determining that a site is acceptable if the only reason that these needs cannot otherwise feasibly be met is that, due to discrimination because of race, color, religion, creed, sex, disability, familial status, or national origin, sites are unavailable. No exceptions exist for siting in areas in danger of re-segregating—the Code forbids placements that will cause a significant increase in the proportion of minorities to non-minorities.<sup>166</sup> While Minneapolis and St. Paul provide some information on recently built and planned affordable housing developments,<sup>167</sup> neither city currently provides information that would allow, under the exception, for these continued placements.

Minneapolis and St. Paul’s recent placements of affordable housing violate the FHA and HUD siting regulations. First, housing authorities must take racial composition of neighborhoods into account before placing affordable developments.<sup>168</sup> Before siting developments, all grantees of federal funds must carefully analyze neighborhood demographics.<sup>169</sup> In *Shannon*, placement of affordable housing in racially segregated or re-segregating neighborhoods constituted a prima facie violation of the FHA.<sup>170</sup> Statutorily, housing authorities may approve new affordable developments in minority-concentrated areas if there are (i) already sufficient and comparable opportunities outside these areas or (ii) if overriding housing ends that cannot otherwise be met make the placement necessary.<sup>171</sup> Neither Minneapolis nor St. Paul has brought forth evidence that the planned developments

---

164. *Id.* § 905.602(d)(4).

165. *Id.* § 905.602(d)(3).

166. *Id.* § 905.602(d)(4).

167. Orfield, *supra* note 143.

168. 24 C.F.R. § 905.602(d)(3)–(4) (2014).

169. *See Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 813 (3d Cir. 1970).

170. *Id.* at 820.

171. 24 C.F.R. § 905.602(d)(3)(i)–(ii) (2014).

meet an exception. Well over three-quarters of all subsidized units are in largely non-White areas.<sup>172</sup> Rather than demonstrating that sufficient and comparable housing opportunities outside of minority-concentrated areas exist, the data demonstrate that the current placements exist in high-crime, low-educational opportunity areas.<sup>173</sup> The current QAPs award no points for racial integration, contrary to the analysis required by *Shannon*<sup>174</sup> and the current Code. Second, the positive obligation is a long term, long-range goal.<sup>175</sup> *Otero* held that the “purpose of racial integration is to benefit the community as a whole, not just certain of its members.”<sup>176</sup> Furthermore, under the *Mount Laurel* doctrine, metropolitan communities have an obligation to provide for its “fair share” of a region’s “existing and projected” need for affordable housing.<sup>177</sup>

Minnesota Housing’s 2014 to 2015 program proposes minor changes to the amount of priority points awarded to certain characteristics and to language, but largely focuses on community development through economic integration, job growth, and transportation.<sup>178</sup> The revisions to the tax credit program neither address racial integration nor school integration transportation costs, nor mention racial integration or school integration.<sup>179</sup>

The cost of these segregative projects adds an additional layer of concern. Based on the information provided by Minneapolis and St. Paul, the QAP favor placements in areas of minority concentration or those areas in danger of re-segregating, where it costs more to develop, instead of placements in largely White suburbs.<sup>180</sup> While project costs are not a proper

---

172. See *Streams*, HOUSINGLINK, <http://www.housinglink.org/streams/>. This dynamic website permits the user to select a type of housing and view its concentration in the Twin Cities Metropolitan Area. Selecting subsidized housing shows a disproportionate amount of subsidized housing in the central cities area.

173. See *id.*

174. *Shannon*, 436 F.2d at 809.

175. See *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).

176. *Id.*

177. *NAACP v. Twp. of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983); *NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J. 1975).

178. *2014-2015 Housing Tax Credit Program, QAP and Procedural Manual Proposed Revisions*, MINN. HOUS. FIN. AGENCY, [http://www.mnhousing.gov/idc/groups/multifamily/documents/document/mhfa\\_013619.pdf](http://www.mnhousing.gov/idc/groups/multifamily/documents/document/mhfa_013619.pdf) (last visited Sept. 30, 2013) [hereinafter *2014-2015 Housing Tax Credit Program*].

179. *Id.* Close proximity to transportation and jobs does not inherently benefit individuals as “[j]obs in central cities for non-professionals are harder to come by and pay less than jobs typically available in surrounding suburban communities.” Long, *supra* note 13, at 95.

180. See *infra* Part III(B)(2).



consideration, any price-oriented arguments against building in the suburbs are easily dismissed. Inner city developments are expensive and, rather than integrating, aim toward community development.<sup>181</sup> Currently, the Twin Cities allocate LIHTC in a manner suggesting that integration is subordinate to expensive development efforts, which obfuscates the FHA's clear obligation to integrate.<sup>182</sup> If AFFH enters into force, this legislation will statutorily approve expensive—and segregative—developments done in the name of community development.<sup>183</sup> This result runs contrary to the FHA's basic obligation to integrate.

## 2. Costly Development Through the Twin Cities QAP

AFFH defines "fair housing choice" to mean that "individuals and families have the information, options, and protection to live where they choose without unlawful discrimination . . . ."<sup>184</sup> According to AFFH, fair housing choice "encompasses actual choice, which means the existence of realistic housing options; protected choice, which means housing that can be accessed without discrimination; and enabled choice, which means the availability and realistic access to sufficient information regarding options so that any choice is informed."<sup>185</sup> The proposed rule does not include integration in its definition of fair housing choice.<sup>186</sup> By omitting integration in the definition of fair housing choice, the rule's current language allows communities to use community improvement plans to fulfill FHA obligations.<sup>187</sup>

The FHA requires more than non-discrimination. Fair housing choice also includes an obligation to integrate, and therefore, providing non-discriminatory housing options alone remains insufficient. Current QAPs, particularly that of the Twin Cities area, although facially non-discriminatory, replace integrative obligations with expensive housing choices; its QAP makes no mention of the Act's affirmative obligation.

Although the FHA and Code require integrative developments, the Twin Cities Board allows segregative placements and chooses expensive placements over integrative,

---

181. *Id.*

182. *Id.*

183. *Id.*

184. AFFH, *supra* note 20, at 43730.

185. *Id.*

186. *Id.*

187. *Id.*

cheaper alternatives.<sup>188</sup> Some consider comparing projects' total development cost per square foot ("TDC/SF") the best manner of evaluating price differences.<sup>189</sup> Therefore, the following calculations use a TDC/SF comparison.

The average TDC/SF in recent Dakota County<sup>190</sup> suburban developments equals approximately \$117.<sup>191</sup> Following requests for affordable housing data from the central corridor, St. Paul and Minneapolis provided housing information, found in Appendix II<sup>192</sup> and Appendix III,<sup>193</sup> respectively. The average TDC/SF in St. Paul equals roughly \$278.<sup>194</sup> This makes the TDC/SF approximately 2.5 times more expensive in St. Paul's central corridor than Dakota County.<sup>195</sup> A few of St. Paul's 2014 planned projects in this area are, individually, closer to triple the TDC/SF of the average Dakota County development.<sup>196</sup> Minneapolis provided less complete data; based off of the numbers provided, Minneapolis developments have an average TDC/SF of \$147, roughly 1.3 times more expensive than Dakota County.<sup>197</sup>

According to St. Paul's Department of Planning and Economic Development, a proper comparison of inner city developments to suburban counterparts takes into account the fact that urban projects accumulate various added costs. Some relevant, cost-increasing factors include:

- Some construction is not new construction, but rather, adapter reuse of historic buildings. Historic adaptive reuse is typically more expensive than new construction;
- In a fully developed city, all new housing developments are on redeveloped sites. This means that something often

---

188. 2014-2015 Housing Tax Credit Program, *supra* note 178.

189. Email from Mark Ulfers, Exec. Dir., Dakota Cnty. Cmty. Dev. Agency, to Myron Orfield, Dir., Inst. on Metro. Opportunity (on file with the Inst. on Metro. Opportunity) [hereinafter Ulfers Email].

190. Dakota County is a predominantly White suburb south of Minneapolis and St. Paul.

191. Ulfers Email, *supra* note 189. The Institute on Metropolitan Opportunity provided a chart detailing each development's specifics in Dakota County produced by the developer of the units. *See infra* Appendix I.

192. *See infra* Appendix II.

193. Email from Matt Goldstein, CPED Residential Fin., City of Minneapolis, to author (July 17, 2013) (on file with author) (numbers calculated by the author) [hereinafter Goldstein Email I]. *See infra* Appendix III.

194. *See infra* Appendix II.

195. *Id.*

196. *Id.*

197. Goldstein Email I, *supra* note 193.

needs to be torn down first, which adds demolition costs and environmental costs to the TDC;

- Urban sites can involve additional permitting costs that allow for the temporary close of streets and sidewalks during stages of the construction; and
- Housing in the central (transit) corridor often has commercial space on the first floor, which further adds to development cost.<sup>198</sup>

Different construction standards for commercial space to residential space contribute to added costs.<sup>199</sup> Many central corridor developments boast first-floor commercial space, which adds to the total development cost.

It is possible to isolate commercial construction costs from residential costs for affordable housing developments.<sup>200</sup> First, the Minnesota Housing Finance Agency's ("MHFA") Multifamily Workbook—pro forma 402 or HTC-1—has separate lines for commercial construction costs; this is done to both help clarify financial underwriting and to determine compliance with low-income housing tax credit rules.<sup>201</sup> Second, data worksheet project summaries list commercial costs as “non-housing costs.”<sup>202</sup>

For example, the non-housing costs for the Currie Lofts project total \$1,594,233.<sup>203</sup> The residential TDC/SF is approximately \$121. If the developer builds the planned, approximately 5000 square feet of commercial space, the cost per square commercial foot will be about \$319. Whether or not this is the TDC/SF, or just construction cost per square foot, is unclear at

198. See *infra* Appendix II.

199. *Id.*

200. Until recently, neither city openly shared its affordable housing data via request or made it easily available online. See *Current Planning & Development Activities*, CITY OF MINNEAPOLIS, <http://www.ci.minneapolis.mn.us/cped/projects/index.htm> (last visited Nov. 10, 2013).

201. 2014-2015 Housing Tax Credit Program, *supra* note 178. See also *Minnesota Multifamily Rental Housing Common Application*, MINN. HOUS. FIN. AGENCY, <http://www.mnhousing.gov/wcs/Satellite?c=Page&cid=1358905251684&pagename=External%2FPage%2FEXTStandardLayout> (last visited Oct. 27, 2014). The application can be downloaded for a breakdown of cost-reporting requirements. *Id.*

202. *Currie Park Lofts (Phase I) Worksheet*, CPED MULTIFAMILY HOUS. DEV., <http://www.minneapolismn.gov/www/groups/public/@clerk/documents/webcontent/wcms1p-084461.pdf> (last visited Nov. 12, 2013) [hereinafter *Currie Lofts Worksheet*]; *Emanuel Housing Worksheet*, CPED MULTIFAMILY HOUS. DEV., [http://www.minneapolismn.gov/www/groups/public/@council/documents/webcontent/convert\\_273566.pdf](http://www.minneapolismn.gov/www/groups/public/@council/documents/webcontent/convert_273566.pdf) (last visited Nov. 12, 2013) [hereinafter *Emanuel Housing Worksheet*]; 2014-2015 Housing Tax Credit Program, *supra* note 178.

203. *Currie Lofts Worksheet*, *supra* note 202.

this time; however, this is roughly a 3:1 ratio, commercial to residential. Even with these resources, determining how much additional cost a mixed-use project possesses is troublesome. Emanuel Housing, which purports to have 10,000 square feet of commercial space, does not have any number listed under “non-housing costs” on its worksheet.<sup>204</sup>

Aurora St. Anthony Neighborhood Development Corporation (“ASANDC”) provided the most thorough information on a mixed-use development, outlined in Appendix IV.<sup>205</sup> Frogtown’s<sup>206</sup> TDC is approximately \$9,737,646 for 61,800 square feet, including 15,000 square feet of private, underground parking.<sup>207</sup> This puts the TDC/SF at approximately \$157.<sup>208</sup> The approximate TDC for the retail space is \$2,326,672 for the 11,700 square feet of commercial space.<sup>209</sup> Therefore, the TDC/SF for the development’s commercial space totals roughly \$199.<sup>210</sup> The TDC for the residential space is roughly \$7,410,973 and there is 50,100 square feet of this space.<sup>211</sup> The TDC/SF equals \$148.<sup>212</sup> These numbers, though inconsistent with the 3:1 ratio of Currie Lofts, nevertheless show that commercial space costs more to develop than residential space and demonstrate that central corridor developments are more expensive, even without the commercial component.

Currently, mixed-use projects cost more to construct than purely residential developments and first-floor commercial space exists more prevalently in the central cities.<sup>213</sup> However, obligations of the FHA demand that affordable developments not be built in areas of minority concentration or areas in danger of re-segregating.<sup>214</sup> Even if these units were less expensive

---

204. *Emanuel Housing Worksheet*, *supra* note 202.

205. Email from Nieeta Presley, Exec. Dir. of ASANDC, to author (Oct. 15, 2013) (on file with author) [hereinafter Presley Email]. Appendix IV is on file with author.

206. Frogtown is the colloquial name for the Thomas-Dale neighborhood in St. Paul, Minnesota. *See Frog Town or Thomas Dale*, RAMSEY CNTY. HISTORICAL SOC’Y, <http://www.rchs.com/neighborhoods/frogtown.htm> (last visited Sept. 24, 2014).

207. *See* Presley Email, *supra* note 205.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *See infra* Part III(B)(2).

214. *See* Presley Email, *supra* note 205.

developmentally, this does not negate the affirmative obligation to site affordable projects in the suburbs.<sup>215</sup>

Whether or not building in urban centers is more affordable, the FHA's positive obligation requires siting in the predominantly White suburbs to achieve racial integration.<sup>216</sup> Community development that is not defined to include integration is not synonymous with integration. The argument that color-blind placements<sup>217</sup> further fair housing because they serve community development is not only non-integrative, but also demonstrates the shortsightedness prohibited under *Otero*.<sup>218</sup> Even though some racial minorities may benefit from housing in an area with first-floor commercial space and other development efforts, if the effect is that of re-segregation or continued segregation, the FHA requires the development's siting elsewhere.<sup>219</sup> A costly housing development does not necessarily fulfill FHA obligations, even if done under the prerogative of community improvement. Monetary costs do not negate the integrative obligation, but rather, can enhance the FHA's affirmative obligation.

At this time, the Twin Cities neither presents evidence of costly suburban development nor explains why current central corridor developments boasting commercial space further its integrative obligations. Placing units in the suburbs both furthers fair housing and does so in a less costly manner. Demographic analysis must take place because the FHA prohibits siting in racially mixed areas if the units will have a re-segregating effect.<sup>220</sup> Until Minneapolis and St. Paul can demonstrate that placements in minority-concentrated areas fall under one of the statutory exceptions—either that there are sufficient and comparable opportunities or that there is an overriding housing need that demands the placement<sup>221</sup>—new affordable developments cannot be built in segregating or re-segregating areas, and the current QAP does not fulfill its FHA positive obligation, even if done with community development intentions.

---

215. *Id.*

216. *See Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).

217. *See Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 809–10 (3d Cir. 1970) (requiring that racial composition be taken into account before siting developments).

218. *Otero*, 484 F.2d at 1134.

219. *See id.*

220. 24 C.F.R. § 905.602(d)(4) (2014).

221. *Id.* § 905.602(d)(3)(i)–(ii) (2014).

*C. Lessons from Other Jurisdictions: Violations and Steps in the Right Direction*

In *Inclusive Communities II*, the court found a disparate impact violation of the FHA when TDHCA disproportionately approved tax credits for low-income housing in minority neighborhoods.<sup>222</sup> ICP argued TDHCA approved roughly 50% of non-elderly affordable units in predominately non-White areas, but failed to approve nearly 40% of these same units in predominantly White areas.<sup>223</sup> ICP alleged TDHCA disproportionately approved LIHTC in minority neighborhoods, and after analyzing TDHCA's data, discovered that nearly 95% of Dallas' LIHTC sited units in areas less than 50% Caucasian.<sup>224</sup> A Texas House Committee on Urban Affairs report found that the QAP "disproportionately allocate[s] federal low income housing tax credit funds . . . to developments located in [areas with above average minority concentrations]."<sup>225</sup> Similarly, the Twin Cities QAP enables placements in minority concentrated areas and sites LIHTC units in these areas.<sup>226</sup>

TDHCA, like the Twin Cities Board, exercises discretion in determining which projects will receive LIHTC by drafting its QAP.<sup>227</sup> The court found that TDHCA failed to argue that alternative means were unavailable or, in the alternative, that a non-discriminatory plan hindered its interest in complying with state and federal law.<sup>228</sup> Like *Inclusive Communities II*, a challenge to the Twin Cities' placements under the FHA likely requires a showing that a disproportionate harm to minorities exists.<sup>229</sup> If challengers to the Twin Cities QAP demonstrate a prima facie showing of disparate impact, the burden shifts back to the Board to show, by a preponderance of the evidence, the QAP's legitimacy and that no less discriminatory means are available.<sup>230</sup>

---

222. *Inclusive Cmty. II*, 860 F. Supp. 2d 312, 332 (N.D. Tex. 2012).

223. *Inclusive Cmty. I*, 749 F. Supp. 2d 486, 499 (N.D. Tex. 2010).

224. *Id.* at 493.

225. *Id.* at 500 ("[A]s of 2006, 77% of LIHTC units in the city of Dallas were in above-average minority areas, leading to 'concentration problems.' A study by the U.S. Department of Housing and Urban Development ('HUD') reached a similar conclusion (reporting that, from 1995–2006, 67% of LIHTC units in Texas were in greater than 50% minority areas, as opposed to 47% of all units; similarly, 69% of all LIHTC units in the city of Dallas were in greater than 50% minority areas, as opposed to 45% of all units.)" (citations omitted)).

226. *Streams*, *supra* note 172.

227. See 26 U.S.C. § 42(m) (2013).

228. *Inclusive Cmty. II*, 860 F. Supp. 2d 312, 332 (N.D. Tex. 2012).

229. *Inclusive Cmty. I*, 749 F. Supp. 2d at 499.

230. See *Inclusive Cmty. II*, 860 F. Supp. 2d at 322–23.

Following the 2012 holding in *Inclusive Communities II*, Texas revised its QAP presumptively to meet its FHA obligations to site integrative affordable developments.<sup>231</sup> Texas' current QAP better addresses the FHA's positive obligation, specifically through its "Housing De-Concentration Factors" ("Factors").<sup>232</sup> Under the Housing De-Concentration Factors, the Texas Board cannot make a LIHTC award to projects in "a county with a population that exceeds one million if the proposed Development Site is also located less than two linear miles from the proposed Development Site of another Application within said county that is awarded in the same calendar year."<sup>233</sup> The Factors forbid a later development's placement in the same mile as a pre-existing development if the developments receive awards within three years of one another.<sup>234</sup> Instead of allowing LIHTC allocations to group together in minority concentrated areas or areas in danger of re-segregating, the Texas QAP makes de-concentration/integration a threshold issue.

Only after an applicant meets the Texas de-concentration requirement does the QAP award any priority points.<sup>235</sup> The Texas QAP awards points for placements near succeeding schools and examines the average income of the neighborhood.<sup>236</sup> A proposed development in the top quartile of median household income and in the attendance zone of a high performing school receives the greatest number of points.<sup>237</sup> As the median household income

---

231. See *TDHCA Board Approved Draft of the Qualified Allocation Plan*, DEP'T OF HOUS. & CMTY. AFFAIRS, TDHCA GOV. BD., <http://www.tdhca.state.tx.us/multifamily/docs/14-DraftQAP.pdf> (last visited Nov. 1, 2013) [hereinafter *Texas 2014 QAP*].

232. *Id.*

233. *Id.* § 11.3(a). Texas' 2008 QAP did not contain housing de-concentration factors. Instead, de-concentration-wise, the 2008 QAP only forbade two placements within one linear mile in the same calendar year. See *2008 Housing Tax Credit Program Qualified Allocation Plan and Rules*, TEX. DEP'T OF HOUS. & CMTY. AFFAIRS, <http://www.tdhca.state.tx.us/multifamily/housing-tax-credits-9pct/docs/08-QAP.pdf> [hereinafter *Texas 2008 QAP*].

234. *Texas 2014 QAP*, *supra* note 231. In order to be ineligible, the proposed development must serve the same type of household as the existing development, the existing development must have received funds at any time during the three-year period preceding the date of the proposed development's application, and the existing development must not have been terminated from the LIHTC program. *Id.* § 11.3(c).

235. See *id.* § 11.2.

236. *Id.* § 11.9(c)(4)(A)(i)–(iv).

237. *Id.* § 11.9(c)(4)(A)(i). In 2008, the QAP awarded only four points for units proposed in either an economically distressed area, an area receiving an award within the past three years from Texas' Agricultural Finance Program or Real Estate Development Program, an area with a higher median income than the

decreases and level of school performance decreases, or one characteristic exists without the other, the number of points awarded drops.<sup>238</sup> The QAP awards additional points for educational excellence.<sup>239</sup> The Texas QAP also gives priority points for total development costs.<sup>240</sup> The QAP explicitly addresses the “efficient use of limited resources and applicant accountability.”<sup>241</sup> As the building costs become more expensive, the QAP awards fewer points.<sup>242</sup>

A QAP that creates balanced and integrative living patterns takes race into account and sites affordable developments to produce long-term, community-wide benefits. But rather than litigate, Minneapolis and St. Paul can take affirmative steps to revise the current QAP.<sup>243</sup> The FHA requires housing authorities to use their leverage to not only avoid discriminatory actions, but also affirmatively take steps to integrate.<sup>244</sup> Affirmative steps must embody long-term, race-conscious efforts. The Twin Cities have the statutory authority to meet this positive obligation and not exchange it for segregative projects obscured as community improvement.<sup>245</sup>

#### IV. Conclusion

Segregation is alive and well in the United States and not simply due to overt discrimination. The federally-mandated QAP gives each LIHTC participant the ability to draft a QAP that best serves its particularized affordable housing needs. A poorly drafted QAP can become segregative in effect, which costs communities not only socially but also monetarily. The FHA requires integration regardless of cost, and community

---

median income for the county, an area within the elementary school attendance zone of an “Exemplary” or “Recognized” elementary school, or an area that will expand affordable housing opportunities for low-income families with children outside of poverty areas. *Texas 2008 QAP*, *supra* note 233, at § 50(9)(i)(16)(A)–(E). However, once the QAP awards points in geographic category (A) through (E), the development becomes ineligible for four points in other areas. *Id.* Therefore, if planned in an economically distressed area, the proposed unit receives four points and has no further incentives to geographically site in areas with higher median incomes or exemplary schools. *See id.*

238. *Texas 2014 QAP*, *supra* note 231, at § 11.9(c)(4)(A)(i)–(iv).

239. *Id.* § 11.9(c)(5).

240. *Id.* § 11.9(e).

241. *Id.*

242. *Id.* § 11.9(e)(2).

243. 26 U.S.C. § 42(m) (2013).

244. *See supra* Part II(A)(2).

245. *Id.*



development does not necessarily constitute integration. At this time, the Twin Cities can build affordable developments in a more inexpensive fashion in the predominantly White suburbs, but its QAP favors expensive, non-integrative developments.

As this Note shows, a poorly drafted QAP can become a tool for segregative, costly development. The Twin Cities serve to demonstrate this reality. Cost alone should not be the sole motivating factor for remedying the non-integrative Twin Cities QAP—on the contrary, societal costs and the failed obligations under the FHA should serve as the primary bases for reform. But high monetary costs further demonstrate that affordable housing development under the FHA, when left unmonitored, become neither fair nor affordable.

**APPENDIX I**

DEVELOPMENT (LOCATION)	YEAR COMPLETED	# OF UNITS	NET RENTABLE SF	SF RENTABLE % SF	CONSTRUCTION BUDGET	TOTAL CONSTRUCTION	PER UNIT CONSTRUCTION COSTS	PER SF CONSTRUCTION COSTS	TDC	PER UNIT TDC	PER SF TDC
Crossroad Commons (Lancette)	2009	87	71,550	98.9%	72.1%	8,615,543	99,029	87.09	1,548,457	12,736	115.74
Cobblestone Square (Apple Valley)	2010	60	48,175	65.208	73.0%	6,660,000	95,422	87.80	7,936,037	132,101	121.55
Thompson Heights (South St. Paul)	2011	60	51,915	68.660	74.3%	6,381,045	96,352	82.99	7,857,829	130,965	112.83
Vermilion River Crossing (Farmington)	2012	66	55,125	77.020	71.0%	6,910,250	101,135	86.68	8,815,568	133,569	114.46

**APPENDIX II**

DEVELOPMENT	YEAR	# OF UNITS	SF	GARAGE SF	TOTAL CONSTRUCTION	TDC	PER UNIT TDC	PER SF TDC
Renaissance Box	2011	70	71,500 (5,000 green spaces)		9,526,000	16,776,682	239,667	234.64
Minnesota Place	2011	77	51,000		10,387,804	14,796,801	192,166	290.13
Minnesota Villas	2011	60	45,397		7,562,760	13,007,047	216,784	285.26
Midway Pointe	2014	50	26,538	25 spaces	8,083,449	9,596,642	191,893	361.62
Old Home	2014	57	95,142 (12,000 commercial)	53 spaces	6,583,500	14,878,218	262,022	156.38
Hamline Station	2014	108	75,000	120 spaces	16,327,571	25,298,157	234,242	337.31

**APPENDIX III**

DEVELOPMENT	YEAR	# OF UNITS	SF	GARAGE SF	TOTAL CONSTRUCTION	TDC	PER UNIT TDC	PER SF TDC
VanCleve Apartments East	2008	70	49,494	38 spaces	5,044,513	7,272,056	207,773	146.93
VanCleve Apartments West	2009	77	89,494	44 spaces	8,318,469	11,536,306	231,126	126.13
VanCleve Townhomes	2009	60			1,295,000	2,285,158	326,451	
4 <sup>th</sup> Street Flats	Closed 2011	50						
Currie Lofts (Phase I)	Proposed 2009	57	370,302 (5,000 commercial)	153 spaces	27,750,511	44,751,100	169,909	120.85 (less reserves)
Emanuel Housing	Proposed 2011	108	85,447 (10,000 commercial)		8,848,556	16,320,327	161,587	191.00

